Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1767

WILMINGTON UNITED NEIGHBORHOODS, et al.,
Petitioners,

v.

U. S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
TABLE OF CITATIONS	ii
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	1
REASONS FOR THE DENIAL OF THE WRIT	4
I. Allegations of Undue Influence Do Not Serve to Permit Review Which Has Been Statutorily Precluded	4
II. Congress Clearly Intended to Preclude Judicial Review of Determinations Made by Designated Planning Agency	6
CONCLUSION	11

TABLE OF CITATIONS.

Cases: Page

Abbott Laboratories v. Gardner, 387 U. S. 136 (1967) 7
Barlow v. Collins, 397 U. S. 159 (1970) 7
D. C. Federation of Civic Associations v. Volpe, 459 F. 2d 1231 (D. C. Cir. 1972) 5
Johnson v. Robison, 415 U. S. 360 (1974) 4
Morris v. Gressette, 432 U. S. 491 (1971) 6, 9
NAACP v. Wilmington Medical Center, 453 F. Supp. 280 (D. Del. 1978) 2
NAACP v. WMC, 584 F. 2d 619 (3rd Cir. 1978) 8
Weinberger v. Salfi, 422 U. S. 749 (1975) 4, 5
Texas Medical Association v. Matthews, 408 F. Supp. 303 (W. D. Tex. 1976) 5

Statutes:

Five U. S. C. § 701(a) 6
Rehabilitation Act of 1973 (29 U. S. C. § 794), section 504 .. 2, 9
Title VI of the Civil Rights Act of 1964 (42 U. S. C. § 2000d) 2
Forty-two U. S. C. 1320a-1:
Section 1122 .....1, 2, 3, 4, 7, 8, 9, 10, 11
Section 1122(d)(1)(A) 7
Section 1122(d)(1)(B)(i) 7
Section 1122(f) 2, 4, 5, 8, 10

Miscellaneous:

H. R. Rep. No. 231, 92d Cong., 2d Sess., reprinted in 1972 U. S. Code Cong. and Admin. News 4989 11

QUESTIONS PRESENTED.

(1) Whether a statute precluding judicial review of a determination by a federal official precludes review of allegations of corruption against that official.

(2) Whether it may be fairly inferred that 42 U. S. C. 1320a-1 precludes review of determinations made by a state agency.

STATEMENT OF THE CASE.

Forty-two U. S. C. 1320a-1 (Section 1122 of the Social Security Act) empowers the Secretary of Health, Education and Welfare (hereinafter "Secretary") to enter into an agreement with state health planning agencies. By entering into such an agreement, the state planning agency undertakes the obligation to review capital expenditures of health care facilities in that state in order to determine whether such capital expenditures are consistent with the standards and criteria developed by the state agency in accordance with regulations implementing section 1122. The Bureau of Comprehensive Health Planning, (the designated planning agency for the State of Delaware, hereinafter "DPA") has undertaken such an obligation.

On March 19, 1976, the Wilmington Medical Center (hereinafter "WMC") submitted an application for a review of a proposed capital expenditure to the DPA. The plan (Plan Omega) called for the construction of a new hospital near Stanton, Delaware. In addition, two facilities currently operated by WMC would be closed. The plan also called for a third currently existing facility to be extensively renovated and modernized.

The DPA and its advisory board undertook extensive review of the plan. Public hearings were conducted on

four different dates at different locations. After receiving comments of its advisory board and after the staff of the DPA had completed its own study, Plan Omega was approved on June 16, 1976. On August 6, 1976, HEW approved Plan Omega for section 1122 purposes.

On September 10, 1976, a civil action was filed in District Court for the District of Delaware, *NAACP, et al. v. Wilmington Medical Center, et al.*, 453 F. Supp. 280 (D. Del. 1978). In that suit it was alleged that Plan Omega violated Title VI of the Civil Rights Act of 1964 (42 U. S. C. § 2000d) and section 504 of the Rehabilitation Act of 1973 (29 U. S. C. § 794). The Court ordered that HEW undertake a study to determine whether Plan Omega was violative of those laws. As a result of a study performed by HEW, WMC and HEW entered into an agreement by which HEW was assured of WMC's future compliance with the provisions of Title VI. The accord reached between WMC and HEW provided, among other things, that WMC would provide a system of transportation for patients to the suburban location, institute patient allocation systems for services which were available at both locations and alter construction and renovation plans in order to accommodate handicapped persons.

In the interim, on February 4, 1977, pursuant to section 1122(f), petitioners requested that the Secretary reconsider his determination that Plan Omega was acceptable for section 1122 purposes. On September 7, 1977, Harold Margulies, M.D., acting on behalf of the Secretary rendered a decision that the DPA's review was consistent with the requirements of section 1122. However, Dr. Margulies went on to comment that changes in the original plan which would be required in order for WMC to meet its obligations under the agreement with HEW, might require WMC to submit those changes to the DPA for additional section 1122 approval. By a letter

dated October 12, 1977 to petitioners' counsel, Dr. Margulies further clarified his decision on reconsideration. In that letter, Dr. Margulies stated that while it was possible that his decision on reconsideration could be interpreted as requiring that Plan Omega, as modified, undergo a new section 1122 review, such was not the case and his decision was intended to indicate that an additional section 1122 review was required only if those changes in Plan Omega necessitated by WMC's agreement with HEW were such as to require separate section 1122 review of those changes.

On September 30, 1977, the Secretary received a letter from Irving Shapiro, Chairman of the Board of the DuPont Company, requesting the Secretary's attention to a letter from an official of WMC. On November 11, 1977, petitioners instituted this action in Federal District Court. The complaint alleged that DPA had failed to consider the standards and criteria set forth in its agreement with HEW in reviewing Plan Omega and that the Shapiro letter was the underlying reason for the Secretary's determination that the modifications of Plan Omega necessitated by WMC's agreement with HEW need undergo section 1122 review only if those modifications fit within the statutory prerequisites for section 1122 review.

The trial court ruled that it was precluded from reviewing determinations made by the Secretary and the DPA pursuant to a section 1122 review. The decision of the District Court was affirmed by the Third Circuit Court of Appeals.

REASONS FOR DENIAL OF THE WRIT.

I. Allegations of Undue Influence Do Not Serve to Permit Review Which Has Been Statutorily Precluded.

Section 1122(f) provides:

> A determination made by the Secretary under this section shall not be subject to administrative or judicial review.

Petitioners argue the determination made by the Secretary that modifications of Plan Omega necessitated by WMC's agreement with HEW need be reviewed only if those modifications met the statutory prerequisites for section 1122 review, was the result of undue influence. They contend that if the Secretary's determination was the result of improper influence, such determination was not made pursuant to the provisions of section 1122 and therefore, the determination may be reviewed by a court. As authority for this proposition, petitioners cite *Johnson v. Robison*, 415 U. S. 360 (1974) and *Weinberger v. Salfi*, 422 U. S. 749 (1975). Neither authority is applicable here.

In *Johnson v. Robison*, this Court was requested to review the constitutionality of a statute which had been applied by a federal administrator in reaching his determination. In that case, the act provided that no federal court shall have the power to review the decision reached by the administrator pursuant to the act. In *Johnson* there was no complaint that the administrator inappropriately applied the provisions of the act, rather the allegation was that the act itself was unconstitutional. This Court ruled that the language contained in the act precluding judicial review of the decision of the administrator does not prohibit a federal court from considering the constitutionality of the law which the administrator is to apply.

Additionally, *Weinberger v. Salfi, supra,* does not deal at all with the issue whether allegations that a determination was the result of undue influence will permit judicial review of an administrator's determination where such review has been precluded by law.

Logic dictates that allegations of undue influence should not permit potential plaintiffs to gain access to court review where it has been otherwise precluded by the express intention of the Congress. The charge of undue influence is simply another way of alleging that the administrator misapplied or ignored standards or criteria for decision set down in the act pursuant to which the decision is rendered or that a decision was rendered where there was no substantial evidence on the record to permit such a determination to be made. Section 1122(f) explicitly precludes review, even on those common grounds for review of administrative agency action. Clearly, one of the reasons for limiting judicial review is to prevent delays in implementing the decision of the administrator which may be occasioned by litigating such questions. To permit judicial review which has otherwise been precluded upon an allegation that the decision reached by an administrator was the result of undue influence will permit those who may be anxious to litigate the question of the lack of substantial evidence or arbitrariness access to the courts where Congress clearly intended to preclude such litigation.

Petitioners have also cited *D. C. Federation of Civic Associations v. Volpe,* 459 F. 2d 1231 (D. C. Cir. 1972) and *Texas Medical Association v. Matthews,* 408 F. Supp. 303 (W. D. Tex. 1976) as additional authority for the proposition that even where a statute has expressly precluded judicial review of a determination, courts may still review such a determination where undue influence has been alleged. These cases are also inapposite. Both cases

stand for the proposition that an administrator's determination may be ruled invalid if it has been demonstrated that such a determination was directly caused by some undue influence. However, in neither was judicial review of the administrator's determination precluded by statute.

This Court has directly considered the question whether an allegation of undue influence will serve to permit judicial review which has otherwise been precluded. In *Morris v. Gressette,* 432 U. S. 491 (1971) this Court indicated the following in footnote 24 of page 507 of its Opinion:

> The United States suggests that there should be limited judicial review only when the Attorney General improperly relinquishes his responsibility to evaluate independently the submitted legislation in light of the standards established by § 5 . . . For the reasons stated in the text, we think Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act.

The cases cited by the petitioners do not support the proposition that where judicial review of an administrative determination has been precluded, an allegation of undue influence will permit review of such a determination. This Court has specifically indicated an allegation that an administrative decision which was not independently made on the statutory bases for such a determination will not permit a court to review the administrative determination where judicial review has been precluded.

II. Congress Clearly Intended to Preclude Judicial Review of Determinations Made by the Designated Planning Agency.

Five U. S. C. § 701(a) provides that determinations made by federal administrative agencies are subject to judicial review except to the extent that Congress has precluded such review. Judicial review of final agency action will not be precluded unless there is persuasive reason to believe such was the intent of Congress. *Abbott Laboratories v. Gardner,* 387 U. S. 136 (1967). A court which has been requested to review final agency action must determine whether "Congress has in express or implied terms precluded judicial review". *Barlow v. Collins,* 397 U. S. 159, 165 (1970). If judicial review has not been expressly precluded by statute, the court requested to review administrative action must determine "whether nonreviewability can be fairly inferred". Id., 397 U. S. at 166.

While there is no express language precluding judicial review of a state agency's section 1122 determination, it may be fairly inferred that Congress intended that the state agency's determination not be subject to judicial review. Section 1122(d)(1)(A) provides that the person proposing capital expenditure must notify the state agency of its intention only sixty days prior to undertaking an obligation for such expenditure. Section 1122(d)(1)(B)(i) provides that the Secretary may not withhold federal reimbursement for that portion of claims representing a proposed capital expenditure, unless prior to the undertaking of the obligation for the expenditure, the state agency has informed the person proposing the capital expenditure that such expenditure is not in conformity with the section 1122 standards it has established.

Basically, section 1122 provides that unless a state agency fails to make a negative determination as to the

acceptability of a proposed capital expenditure within as little as sixty days, such expenditure will be deemed approved. In addition, if the state agency has positively recommended section 1122 approval of a proposed expenditure to the Secretary, the Secretary is confined to making a ministerial determination that proper procedures were followed. The Secretary does not have the ability to review each proposal and make a separate determination as to its necessity, nor does he have the more limited ability of assuring that there was substantial evidence to support the determination made by the DPA. See *NAACP v. WMC*, 584 F. 2d 619 (3rd Cir. 1978). The review procedure set forth in section 1122 is a very streamlined one. The state agency must complete its review in as little as sixty days. Unless the state agency makes a negative determination in as short a period as sixty days, it is deemed to have approved the proposed capital expenditure. If the state agency makes a determination that the expenditure is necessary or fails to make a determination that it is necessary within a relatively short time, the Secretary is then limited to a ministeria! review to insure that proper procedures are followed. In the case of a negative recommendation by the state agency, the Secretary's duties become somewhat more expanded, but it is clear that the procedure remains a relatively streamlined one.

Congress attempted to insure that after the Secretary's determination had been made, the procedure would remain streamlined by precluding judicial review of the Secretary's determination by the provisions of section 1122(f). Congress recognized that judicial review of determinations made pursuant to section 1122 could have the effect of greatly delaying proposed capital expenditures. In view of inflation, such delay may have the effect of greatly increasing the cost of a proposed ex-

penditure, an effect which runs contrary to the central purpose of section 1122 review. In light of the streamlined procedure adopted by Congress in section 1122 and the clearly expressed intent of Congress that determinations of the Secretary not be subject to judicial review, it may fairly be inferred that Congress intended that judicial review of determinations made by the DPA should be similarly precluded.

A procedure similar to that set forth in section 1122 was reviewed by this Court in *Morris v. Gressette,* 432 U. S. 491 (1971). In that case, the streamlined procedures set forth in the act under review in large measure supported this Court's determination that a decision reached by the Attorney General pursuant to that Act was not subject to judicial review.

The Voting Rights Act provides that before a state subject to the Act can change any voting qualifications, it must first submit the proposed change to either the United States District Court or the Attorney General of the United States. If the state choose to submit the plan to the Attorney General, it can not effectuate the change unless the Attorney General failed to interpose an objection to it within sixty days after it was submitted.

Although § 5 of the Voting Rights Act does expressly preclude judicial review of the determination made by the Attorney General, this Court recognized that Congress selected the alternate procedure of submitting the proposed change to the Attorney General's Office for comment by him within sixty days in order to permit implementation of the change without undue delay. At page 504 of its Opinion, this Court stated:

> The Congressional intent is plain. The extraordinary remedy of postponing the implementation of validly enacted state legislation was to come

> to an end when the Attorney General failed to interpose a timely objection based on a complete submission. Although there was to be no bar to subsequent constitutional challenge to the implemented legislation, there also was to be no "dragging out" of the extraordinary federal remedy beyond the period specified in the statute.

In light of Congress' intent that such changes be permitted to be rapidly implemented where the Attorney General had failed to find such change objectionable, this Court found that it could be fairly inferred that Congress intended to preclude judicial review of the Attorney General's failure to interpose a timely objection. It is clear that Congress intended that section 1122 review should also be a speedy one. In section 1122, Congress took the further action of precluding judicial review of the Secretary's determinations. Such action is further evidence of Congress's intent to preclude judicial review of the entire section 1122 process.

In light of the Secretary's limited role in the case of a positive determination made by the DPA, it would be a most odd result to permit review of the substantive determinations made by the DPA, yet exclude review of the ministerial actions of the Secretary. If the intent of Congress in prohibiting judicial review of the Secretary's determination under section 1122(f) was to permit rapid final action under section 1122, such intent would be clearly defeated if the substantive determinations made by the DPA can be reviewed by the courts.

Finally, the conclusion that Congress intended to preclude judicial review is further compelled by the legislative history cited by both District Court and Third Circuit Court of Appeals indicating that Congress intended section 1122 review "would in no way change the au-

tonomy of authority of the existing state or local agencies," H. R. Rep. No. 231, 92d Cong. 2d Sess., *reprinted in* 1972 U. S. Code Cong. and Admin. News 4989, 5066. The intent of Congress to give state agencies as much autonomy as possible is reflected in the limited role to be performed by the Secretary in section 1122 review. The judicial review by federal courts of determinations made by the state agency would not only undermine the agency's autonomy, it would indeed be an odd result in light of the limited role of the Secretary.

Section 1122, its legislative history and logic dictates that conclusion that Congress intended the determinations made by the DPA pursuant to a section 1122 review should not be subject to judicial review.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should be denied.

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